

**BEFORE THE HARYANA REAL ESTATE REGULATORY
AUTHORITY, GURUGRAM**

Complaint no. : 4405 of 2020
First date of hearing : 10.02.2021
Date of Decision : 31.03.2021

1. Sunil Kumar
2. Neetu Tomar
Both R/o – C-51, 2nd Floor, Shashi Garden,
Mayur Vihar Phase-1, New Delhi-110091

Complainants

Versus

Elan Buildcon Private Limited
Regd. office: -L-1/1100,
G/F Sangam Vihar, Gali no. - 25
New Delhi-110062

Respondent

CORAM:

Shri Samir Kumar
Shri Vijay Kumar Goyal

**Member
Member**

APPEARANCE:

Sh. Utkarsh Joshi

Advocate for the complainants

Sh. Ganesh Kamath

Advocate for the respondent

ORDER

1. The present complaint dated 10.12.2020 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all



obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

2. The particulars of the project, unit, sale consideration, the amount paid by the complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Project name and location	"Elan Miracle", Sector-84, Village Hayatpur, Gurugram
2.	Project area	5.91875 acres
3.	Nature of the project	Commercial colony
4.	DTCP license no.	34 of 2014 dated 12.06.2014
	License valid up to	11.06.2019
	Licensee	Bajaj Motors Ltd. & others
5.	RERA registered/not registered	Registered
	HARERA registration no.	190 of 2017 dated 14.09.2017
	Validity of registration	13.09.2023
6.	Unit no.	Kiosk-06, 2 nd Floor [Page no. 22 of complaint]
7.	Provisional booking with its date if any	30.06.2017 [As per acknowledgement on page no. 22 of complaint]
8.	Unit measuring	350sq. ft.



9.	Date of execution of apartment buyer's agreement	Not executed
10.	Memorandum of Understanding	18.08.2017 [Page no. 23 of complaint]
11.	Payment plan	Construction linked payment plan. [Page 25 of complaint]
12.	Total consideration	Rs.20,08,387/- [As per Reminder-I, page 123 of complaint]
13.	Total amount paid by the complainant	Rs. 9,50,000/- [As per Reminder-I, page 123 of complaint]

B. Facts of the complaint

3. The complainant booked the unit no. Kiosk-06 having super area of 350 sq. ft. on 2nd floor in the project namely "Elan Miracle" situated at sector-84, village Hayatpur, Gurugram on 30.06.2017 and has paid a total sum of Rs. 9,50,000/- which amounts to approximately 43% of the total price as per the schedule given below:

S. No.	Instalment Name	Description
1	On application of booking	40% of Basic Sale Price
2	Within 6 months of booking	5% of Basic Sale Price
3	After 2.5 years of booking	25% of Basic Sale Price + 100% of EDC/IDC
4	On offer of possession	30% of Basic Sale Price + 100% of PLC + 100% of IFMS + 100% of Car Parking-Usage Rights(optional) + All other



	charges (as may be applicable)
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4. In August, the parties entered into a Memorandum of Understanding (MoU) dated 18.08.2017 whereby the respondent agreed to pay the complainant a monthly sum of Rs. 12,591/-.
5. The emails were exchanged between the parties between 06.12.2019 and 11.12.2019 whereby the complainant informed the respondent that she has paid more than 43% of the total price and no BBA had been entered into between the parties. The respondent stated that the HRERA is not applicable on the present dispute, and they had shared copies of a draft BBA to which the complainant had not sent a response.
6. On 02.07.2020, the complainant received 'reminder I' demand letter from the respondent. This demand letter claimed an amount of Rs. 10,58,387/- with interest calculated at 24% p.a.
7. On 27.07.2020, the complainant responded to the aforesaid demand letter reiterating their contentions stated in the legal notice dated 28.12.2019. The said response reminded the respondent to modify their draft BBA in accordance with the model agreement laid down in the rules. That no response has been received from the respondent with respect to all of the communication sent by the complainant.
8. On 09.11.2020, the complainant received 'reminder II' demand letter from the respondent. This letter claimed an



amount of Rs. 11,27,359/- with an interest component of Rs 1,48,836/- with interest calculated at 24% p.a.

9. That despite a payment of approximately 43% of the total price, the respondent has failed to enter into a legally valid builder buyer agreement. The responses and communications sent by the complainant have been met with studied silence and demand notices in clear violation of section 13 of the Act are being issued to the complainant as a measure to force the complainant to cough up more money without any legal agreement.

C. Relief sought by the complainants:

10. The complainants have sought following reliefs:

- (i) Direct the respondent to enter into a legally valid builder buyer agreement in accordance with the RERA Act, 2016 and the Haryana RERA rules and its corresponding regulations; and
- (ii) Direct the respondent to cease sending 'demand notices' or 'reminders' until a legally valid builder buyer agreement is entered into.

D. Reply by the respondent

11. The respondent has contested the complaint on the following grounds.
- i. That the complainant is regular investor who has been investing into real estate projects. The complainant has miserably failed to adhere to her promises of timely payments.

- ii. A mere perusal of the emails show that the complainant has been avoiding the signing of BBA on false/flimsy pretexts. Thus, the complainant, with mala fide intent, has not mentioned the fact that she has already received a huge amount towards "assured returns" from the respondent for the present unit.
- iii. After framing of rules in the State of Haryana, the developer has not charged any further instalments without first offering BBA to the customers. In the present project, most of the customers have signed the BBA, but the complainant chose to evade her part of obligations in guise of false pretexts.
- iv. The officers of the respondent have been in touch with the complainant requesting her again and again to execute the BBA and pay the further amount, but she has been delaying it on one or the other pretext.
- v. Further, a mere perusal of the clauses of the said MOU dated 18.08.2017 filed by the complainant makes it abundantly clear that she was informed of her duties/obligations well in advance and signed the forms clearly after understanding their obligations. Further, an MOU was also signed soon after the said booking form.
- vi. The complainant has paid merely an amount of Rs. 9,50,000/- out of Rs.20,08,387/- (plus applicable taxes) against unit no. KIOSK-06. It is most humbly submitted that a huge amount is due towards the complainant

12. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.
13. The respondent has prayed for the dismissal of the complaint.
14. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

E. Findings on the objection raised by the respondent

E.I Objection regarding complainants being investor

15. The respondent has taken a stand that the complainant is an investor and not a consumer, therefore, is not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act read with rule 28 of the rules. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states the main aims & objectives of enacting a statute but at the same, time preamble cannot be used to defeat the enabling provisions of



the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter he contravenes or violates any provisions of the Act or rules, or regulations made thereunder. Upon careful perusal of all the terms and conditions of MoU, it is revealed that the complainant is a buyer and has paid total price of Rs.9,50,000/- to the promoter towards purchase of the apartment in his project. At this stage, it is important to stress upon the definition of term allottee under the Act and the same is reproduced below for ready reference:

"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"

16. In view of above-mentioned definition of "allottee", it is crystal clear that the complainant is an allottee as the subject unit was allotted to her by the promoter. The concept of investor is not defined or referred anywhere in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as *M/s Srushti Sangam*

Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr. has also held that the concept of investor is not been defined or referred in the Act. Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

E.2 The complainants failed to adhere to the promises of timely payments: -

17. As per the observations of authority, the total consideration of the apartment is Rs.20,08,387/-. The complainant has paid only Rs. 9,50,000/- including service tax and sum of Rs.10,58,387/- is still outstanding which in spite of the respondent's reminders/demand letters has not been paid. However, it is contended on behalf of builder that despite issuance of number of reminders, the allottee did not come forward to execute builder buyer agreement of the allotted unit. Though she has paid a major portion of sale consideration, but she was also paid assured return of the allotted unit. So, no fault in this regard could be found with the respondent. On the basis of provisional booking 30.06.2017, the complainant started depositing different amounts against the allotted unit with the respondent builder. As per the MoU dated 18.08.2017, he was required to pay 40% of the total sale consideration at the time of booking



of unit, 5% of basic sale price within 6 months of booking, 25% of basic sale price plus 100% of EDC, IDC after 2.5 years of booking and the remaining amount at the time of offer of possession. It is not disputed that on the basis of the provisional booking, a MoU dated 18.08.2017 was executed between the parties. He paid a sum of Rs.9,50,000/- out of total sale consideration but also received a substantial amount as assured returns from the respondent builder. Though a number of reminders for payment of amount due were issued by the respondent builder to the complainant but there is nothing on record to show that it asked the allottee to execute the builder buyer agreement. Section 13(1) of the Act, 2016 prescribes that a promoter shall not accept a sum more than 10% of cost of apartment, plot, building as an advance. The relevant section is reproduced below for ready reference:

Section 13(1) - A promoter shall not accept a sum more than ten per cent of the cost of the apartment, plot, or building, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force.

18. But to the utter disregard to these provision & law of natural justice, the builder failed to execute any BBA of the allotted unit despite receiving a substantial amount from the allottee. So, the complainant is right in asking the respondent builder

to execute a BBA of the allotted unit in her favour and raise demand after that of the amount due against her. Thus, the respondent is directed to execute the BBA in favour of complainant of the allotted unit.

19. Though the authority is satisfied that the complainant is in contravention of section 19(6) of the Act but since no BBA as per the provision of section 13(1) has been executed between the parties. So, prior to that no demand for the amount due can be raised against the allottee. After the execution of BBA, the allottee can be directed to comply with the provision of section 19(6) of the Act and the builder can legally raise the demand of the amount due against the allotted unit.

F. Findings on the relief sought by the complainants

Relief sought by the complainants - Direct the respondent to enter into a legally valid builder buyer agreement in accordance with the RERA Act, 2016 and the Haryana RERA rules and its corresponding regulations.

20. As per the observations of authority, the total consideration of the apartment is Rs.20,08,387/-. The complainant has paid Rs. 9,50,000/- including service tax. According to section 13 of the Act, it is obligatory on the part of promoter to register the said agreement for sale and shall not accept a sum more than 10% of the cost of total sale consideration. The complainant contended that he has requested the respondent



to execute the builder buyer agreement which has not been provided by the respondent till date, but the respondent has contended that the allottee is not coming forward to execute the builder buyer agreement. Though it is pleaded that the builder buyer agreement was executed between the parties, but the respondent builder failed to place on file copy of the same. Therefore, the respondent is directed to execute the builder buyer agreement in favour of complainants on the allotted unit

21. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not executing the builder buyer's agreement.

G. Directions of the authority

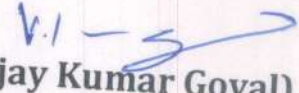
22. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondent is directed execute the allotted unit's buyer's agreement in favour of complainants within 15 days. *otherwise penal action shall be initiated u/s 63 of Act.*
- ii. The complainants are thereafter directed to make the requisite payments as per the builder buyer agreement.

23. Complaint stands disposed of.

24. File be consigned to registry.


(Samir Kumar)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 31.03.2021

Judgement Uploaded on 06.09.2021



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